

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
GTE CORPORATION, )  
 )  
Transferor )  
and )  
 )  
BELL ATLANTIC CORPORATION, )  
 )  
Transferee )  
 )  
For Consent to Transfer of Control )

CC Docket 98-184

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF US XCHANGE, L.L.C.  
IN OPPOSITION TO THE MERGER OF  
BELL ATLANTIC CORPORATION AND GTE CORPORATION**

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## SUMMARY OF COMMENTS

US Xchange, L.L.C. ("US Xchange") urges the Commission to reject the Application of Bell Atlantic Corporation and GTE Corporation for a merger of the two companies. While it is questionable whether the increased size of a Bell Atlantic-GTE behemoth incumbent local exchange carrier ("ILEC") would promote competitive entry into other ILEC service areas, the more certain and troubling result of the merger would be that Bell Atlantic and GTE – with their increased market power and combined resources – would have the ability to raise even higher the already substantial barriers to competitive entry in their service areas. Indeed, the data reported by these ILECs to the Commission indicate that neither company has truly opened its local market to competition, and US Xchange's own experiences with GTE lead it to believe that giving this company increased market power would only reduce new entrants' ability to obtain interconnection and achieve competitive entry in a timely and efficient manner. Since this merger is unlikely to have any beneficial impact upon competition outside of Bell Atlantic and GTE local exchange markets, and will only strengthen the resolve and ability of Bell Atlantic and GTE to protect their incumbent territories, this Commission should reject the merger, or in the alternative, approve it only subject to stringent market-opening conditions that would help to ensure that the new mega-ILEC complies with the procompetitive provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.

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IN OPPOSITION TO THE MERGER OF  
BELL ATLANTIC CORPORATION AND GTE CORPORATION**

US Xchange, L.L.C. ("US Xchange"), by undersigned counsel, hereby submits its Comments in Opposition to the proposed union of Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE"). With its competitive local exchange carrier ("CLEC") subsidiaries currently operating in GTE service areas in several states, US Xchange has experienced first hand the significant anticompetitive roadblocks that GTE has managed to erect. In light of the enhanced market power and increased incentives to protect its valuable monopoly-era status in the local exchange market that would result from the creation of a Bell Atlantic-GTE behemoth incumbent local exchange carrier ("ILEC"), the Commission should deny the request for approval of this merger, or in the alternative, require Bell Atlantic-GTE to adhere to stringent market-opening conditions that would protect against the improper exercise of market power by the mega-ILEC.

## **I. THE MERGER WILL IMPEDE THE DEVELOPMENT OF LOCAL COMPETITION.**

This proposed merger, along with the proposed SBC-Ameritech, merger, would change deeply the character of nascent competition in local exchange markets across the country, as even those preliminary steps made by CLECs to date are halted in the face of two mega-ILECs with increased market power. If both this merger and the SBC-Ameritech merger are consummated, two mammoth ILECs will control a combined two-thirds of the access lines.<sup>1</sup> Bell Atlantic already controls over 41 million access lines<sup>2</sup> and serves the headquarters of 175 of the Fortune 500 companies.<sup>3</sup> After merging with GTE, the combined company will have 63 million access lines,<sup>4</sup> or over one-third of the access lines in the country. From California in the West to New York and Washington in the East, the largest markets and biggest customers would be locked up by the two massive ILECs.

In essence, this merger will propel the nation toward the reassembly of the Bell System. Yet no result could be more in conflict with the procompetitive provisions of the Communications Act

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<sup>1</sup> See Federal Communications Commission, *Statistics of Common Carriers*, Table 2.10.

<sup>2</sup> Bell Atlantic Media Fact Sheet, <http://www.ba.com/kit/>.

<sup>3</sup> "Bell Atlantic and GTE Agree to Merge," News Release, July 28, 1998, <http://www.ba.com/nr/1998/Jul/19980728001.html>. SBC claims that "224 Fortune 500 companies are headquartered in the 13 states served by SBC, Ameritech, and SNET." *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferee, to SBC Communications Inc., Transferor*, CC Docket 98-141, Affidavit of James S. Kahan, ¶49 (Attachment to SBC-Ameritech *Description of the Transaction, Public Interest Showing and Related Demonstrations* ("SBC/Ameritech Public Interest Statement"). Combined with the 175 headquarters serviced by Bell Atlantic, that makes a total of 399 Fortune 500 companies that would be served by these mega-ILECs.

<sup>4</sup> "Bell Atlantic and GTE Agree to Merge," News Release, July 28, 1998.

of 1934 ("Act"), as amended by the Telecommunications Act of 1996 ("1996 Act"). Congress intended that the 1996 Act would inject much-needed competition into local exchange markets; it could not have anticipated that the promise of attracting new customers in other service areas would be achieved through efforts to resurrect the Bell monopoly. The resulting synthesis of market power that would be held by the Bell Atlantic-GTE behemoth is of special concern as circumstances indicate that neither company has provided CLECs to date with the open network access and interconnection opportunities envisioned by the Act. Given their clear animus towards competition, the Commission should deny the further consolidation (and enhanced market power) of these two entrenched monopolies.

Bell Atlantic and GTE argue that the merger will not have an adverse impact upon competition, as they do not compete against one another in any local market.<sup>5</sup> This is not the only standard by which this merger of monopolists should be judged. Under section 7 of the Clayton Act,<sup>6</sup> the Commission is directed to consider "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future."<sup>7</sup> Given the high velocity of change and innovation in the telecommunications industry, the possibility of a future chilling of competition should be of especially strong concern for the

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<sup>5</sup> While technically correct, Bell Atlantic and GTE are incumbents in adjacent areas in Virginia (where GTE provides service in suburban Washington, D.C.) and Pennsylvania (where GTE is the incumbent for York).

<sup>6</sup> The Commission must conduct an analysis under the Clayton Act when considering the approval of mergers. *See Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211 (rel. Sept. 14, 1998), at ¶ 9 ("*MCI/WorldCom Merger Order*").

<sup>7</sup> *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963).

Commission. US Xchange notes two particularly striking concerns that the Commission must consider in this matter: (i) the possibility that the combined company will redouble its efforts to impede competition in its expanded local territories; and (ii) the substantial likelihood that this union will result in a tacit geographic division of the U.S. local telecommunications market between the combined SBC-Ameritech companies and the Bell Atlantic-GTE entity.

**A. With Greater Size and Enhanced Market Power, the Bell Atlantic-GTE Behemoth Will Also Have Increased Ability and Incentives to Limit Competitive Entry into its Local Exchange Markets.**

In the *Bell Atlantic/NYNEX* merger proceeding,<sup>8</sup> the Commission recognized that a merger between ILECs could adversely affect the parties' willingness to cooperate with market opening reforms. While "one incumbent LEC may have an incentive to cooperate with its competitors, contrary to the interests of the other LECs,"<sup>9</sup> the Commission reasoned, "[i]f two major incumbent LECs merge, however, this incentive may be reduced. To the post-merger incumbent LEC, cooperation in one area may have untoward consequences in another and cooperation may be against the firm's overall interests."<sup>10</sup> As the Commission concluded, "[t]his may result in the post-merger LEC cooperating less than the pre-merger incumbent LECs would have in enabling competition to grow."<sup>11</sup> The Commission found that while this factor was not a sufficient rationale to require the

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<sup>8</sup> *Applications of NYNEX Corporation, Transferor and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic/NYNEX Merger Order*").

<sup>9</sup> *Id.* at 20061, ¶ 154.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

rejection of the Bell Atlantic-NYNEX merger, it opined that additional mergers might heighten these concerns further.<sup>12</sup>

The danger noted by the Commission in the *Bell Atlantic-NYNEX Merger Order* is quite apparent in the context of the proposed union of Bell Atlantic and GTE. Because Bell Atlantic is seeking approval to enter the interLATA marketplace in New York (and presumably will follow suit in other states), it must demonstrate the availability of competition in the local markets that it serves; thus, Bell Atlantic has a modicum of incentive to comply with market-opening measures. By contrast, GTE is exempt from seeking section 271 approval prior to offering interLATA service and is already offering such services in 50 states.<sup>13</sup> Not surprisingly, GTE has had little incentive to cooperate with competitors,<sup>14</sup> resulting in almost unfettered success in thwarting competition. Indeed, in Florida, where competitive entry into GTE's service area appears *most strong*, CLECs serve less than 2% of the market through resold lines or unbundled network elements ("UNEs").<sup>15</sup>

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<sup>12</sup> *Id.* at 20062, ¶ 156.

<sup>13</sup> See GTE Corporation Annual Report 1996, "Introduction," <http://www.gte.com/AboutGTE/annual1996/intro/intro.html>.

<sup>14</sup> The difference between GTE and the Bells became apparent to even the Bells soon after the 1996 Act was passed. Ameritech's CEO was quoted as saying: "The big difference between us and them [GTE] is they're already in long distance. What's their incentive to cooperate?" "Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay," *Washington Post*, October 23, 1996, at C12. More details on US Xchange's discouraging interaction with GTE are provided in section I.C below.

<sup>15</sup> In its voluntary response to the Commission's most recent survey on the state of local competition, GTE reported the total of local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines GTE provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: California - 0.9%; Florida - 1.7%; Hawaii - .02%; Illinois - .005%; Indiana - .0007%; Kentucky - 0.2%; Michigan - 0%; North Carolina - 0.2%; Ohio - .004%; Oregon - .03%; Pennsylvania - .01%; Texas - 1.1%; Virginia - .02%; Washington - .02%; Wisconsin - .06%. GTE Responses to Second Common Carrier

In states such as Michigan, Indiana, and Illinois – states in which US Xchange has focused on competing with both Ameritech and GTE to date – GTE had provisioned a *total* of 48 resold lines as of June 30, 1998, and no UNEs. In other words, more than two years after enactment of the 1996 Act, CLECs in GTE's territory in these three states provide service through resold lines and UNEs to approximately .001% of the market.<sup>16</sup> In Wisconsin, GTE fares little better, having provisioned 294 lines and 12 UNEs, representing .06% of all GTE lines in the market.<sup>17</sup> Such figures provide *prima facie* evidence of how difficult GTE has made it for competitors to get up and running in its incumbent markets.

If merged, the combined company will have added incentive to prevent competition as a means to avoid-precedent setting market-opening measures in the virtually untouched GTE service

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Bureau Survey on the State of Local Competition, Federal Communications Commission, <http://www.fcc.gov/ccb/local-competition/survey/responses> Of the total lines GTE provided other carriers, slightly under 1% were UNEs. *Id.*

The comparable figures for Bell Atlantic, while also disturbingly low, are at least an improvement over the paltry total captured in GTE's figures. The number of total local lines Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland - 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. *Id.* Of the total lines Bell Atlantic provided other carriers, 12.3% were UNEs. *Id.*

<sup>16</sup> *See id.* By contrast, Ameritech – which is by no means a model of competitive cooperation in US Xchange's experience – had provisioned over 360,000 resold lines and over 50,000 UNEs in these three states by the same time frame. While more impressive than the troubling statistics for GTE, it should be noted that these Ameritech figures represent only 2.7% of the total Ameritech access lines for Illinois, Indiana, and Michigan. *Id.*

<sup>17</sup> *Id.* Ameritech's report for Wisconsin indicates that the company provisioned 29,685 resold lines and 1,130 UNEs by June 30, 1998, representing approximately 1.3% of its lines in the state. *Id.*

areas. The substantial resources of the combined company would also provide Bell Atlantic-GTE with an enhanced ability to engage in such protectionist tactics. From the combined companies' viewpoint it would not be an unreasonable position – as they would control of over one-third of the nation's access lines – to conclude that the possible benefits from seeking Section 271 approval do not outweigh the potential loss in the access line monopolies they currently enjoy in both Bell Atlantic and GTE service territories.

**B. Notwithstanding the Promises of Bell Atlantic and GTE, the Merger Will Decrease the Likelihood of Potential Competitive Entry into Other ILEC Markets.**

The Commission has acknowledged that "[a]s the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers."<sup>18</sup> With few exceptions, ILECs have not sought to disrupt the current equilibrium of geographic division among ILECs (except through mergers, which may break geographic barriers, but do not provide any of the associated benefits of added competition). Thus, the current geographic division of markets is an undisturbed equilibrium that operates to the detriment of customers.

On a related note, this Commission has recognized that where a significant market participant has "something to lose," it is more likely to participate in tacit market-sharing arrangements,<sup>19</sup> thereby arriving at such a mutually beneficial equilibrium. The "something" in this case is monopoly control of a sizeable percentage of the nation's access lines. With control of more than one-third of

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<sup>18</sup> *Bell/Atlantic/NYNEX Merger Order*, 12 FCC Rcd at 20047, ¶ 121.

<sup>19</sup> *Id.* at 20047-48, ¶ 123.

the nation's access lines, the combined Bell Atlantic-GTE would clearly have "something to lose" – for example, domination of the New York City market – if, after the merger, it attacks Dallas, Los Angeles or other markets now dominated by other ILECs. With so much at stake, a combined Bell Atlantic-GTE would almost certainly decline to risk retaliation and the potential loss of clients in lucrative areas such as New York, Boston, and Washington.

In the SBC-Ameritech merger application, the Applicants claimed that the threat of competition from large non-ILEC companies in the local exchange market for the largest, most profitable corporate customers led them to the conclusion that competing out-of-region was the most likely way to avoid losing their core in-region customer base.<sup>20</sup> In this case, however, GTE acknowledges that it already has "an imperative to compete given its island-like service areas in the other Bells' seas," and thus "already has established a separate corporate unit to plan for entry into territory close to its own few urban franchise areas near Los Angeles, Dallas, Tampa, and Seattle."<sup>21</sup> GTE is also "currently testing the use of its own wireless switch in San Francisco to provide local wireline service in SBC territory."<sup>22</sup>

In addition to those cities, GTE also shares an MSA or serves neighboring suburbs with several other urban areas presently controlled by various Bells: San Francisco, San Diego, Houston, Chicago, Cleveland, Indianapolis, Detroit, Orlando, Jacksonville, and Portland.<sup>23</sup> These areas are

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<sup>20</sup> Affidavit of James S. Kahan, ¶ 13 (Attachment to *SBC/Ameritech Public Interest Statement*).

<sup>21</sup> *GTE Corporation and Bell Atlantic Corporation, Application for Consent to Transfer of Control*, Application for Transfer of Control, Public Interest Statement ("*Application*"), at 7.

<sup>22</sup> Kissell Aff't, at ¶ 13.

<sup>23</sup> *Application*, Public Interest Statement, at 2.

natural targets for competitive entrance by GTE. In light of all of these competitive steps already taken and GTE's presence just outside other ILEC metropolitan areas around the country, it only made sense when GTE's Chairman and CEO commented to shareholders that he was "confident about GTE's ability to succeed in the competitive marketplace *without* entering into a major transaction or combination with another company. In other words, we can go it alone and win."<sup>24</sup> This merger represents an abandonment of that competitive resolve. This proposed union of ILECs, together with the SBC-Ameritech merger, severely *lessens* the possibility that the combined Bell Atlantic-GTE will find it in its interest to disturb the current "mutually beneficial equilibrium" represented by the existing geographical division of the local exchange marketplace.

Yet, like SBC-Ameritech, Bell Atlantic and GTE contend that the merger is a necessary pre-requisite for the companies to have sufficient resources to compete in their home markets and to enter markets elsewhere. This argument is specious. In considering GTE's change of heart and its claims that it cannot now "go it alone," the Commission should not overlook the fact that Bell Atlantic and GTE are already huge companies capable of competitive forays without each other's assistance. Bell Atlantic already controls over 41 million access lines<sup>25</sup> and serves the headquarters of 175 of the Fortune 500 companies.<sup>26</sup> In 1997, GTE had revenues of \$23.26 billion, operating

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<sup>24</sup> GTE Corporation Annual Report 1997, "Chairman's Message" (emphasis in original) <http://www.gte.com/AboutGTE/annual1997/message1.html>.

<sup>25</sup> Bell Atlantic Media Fact Sheet, <http://www.ba.com/kit/>.

<sup>26</sup> "Bell Atlantic and GTE Agree to Merge," News Release, July 28, 1998, <http://www.ba.com/nr/1998/Jul/19980728001.html>.

income of \$5.6 billion, and net income of \$2.79 billion.<sup>27</sup> Moreover, both Bell Atlantic and GTE are continuing to do well financially. With its sustained financial health, GTE should stand ready to enter other incumbent markets without the assistance of Bell Atlantic's sizeable purse. As GTE recently announced, it has just experienced its "13th consecutive quarter of double-digit [earnings per share] growth."<sup>28</sup> The company has also experienced five straight quarters of consolidated revenue growth.<sup>29</sup> The even larger Bell Atlantic reported last month that its consolidated operating income increased 12.4 percent in the third quarter of 1998, and that its earnings per share increased by 11.3 percent in the same period.<sup>30</sup>

Despite this sustained financial health even in the face of ostensible local competition, Bell Atlantic and GTE would have the Commission believe that AT&T, MCI WorldCom, and Sprint are preparing to overwhelm the ILECs. Of course, more than two years after the Act, there is no indication that these companies have made any significant competitive inroads into the local market, with this Commission's Local Competition Survey indicating that competitive entry into both Bell Atlantic and GTE service areas has been minimal.<sup>31</sup> Moreover, the 1997 figures show that GTE and

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<sup>27</sup> GTE Corporation Annual Report 1997, Consolidated Financial Highlights, <http://www.gte.com/AboutGTE/annual1997/bigidea.html>.

<sup>28</sup> "GTE Reports 11% Consolidated Income Growth and Double-Digit Core EPS Growth in Third Quarter," Press Release, Oct. 19, 1998, <http://www.gte.com/AboutGTE/news/3Q98.html>.

<sup>29</sup> See *id.*; "GTE Announces Strong Financial Results, Generating Double-Digit Consolidated Revenue Growth and 11% Core EPS Growth in Second Quarter," Press Release, July 20, 1998, <http://www.gte.com/AboutGTE/news/2Q98.html>.

<sup>30</sup> "Bell Atlantic Third Quarter Adjusted EPS Rises 11.3%," News Release, Oct. 21, 1998, <http://www.ba.com/nr/1998/Oct/19981021002.html>.

<sup>31</sup> See footnotes 15-17 *supra* and accompanying text.

Bell Atlantic are individually larger than Sprint (\$14 billion revenue, \$952 million net income),<sup>32</sup> comparable to MCI WorldCom (\$27 billion revenue, \$592 million net income),<sup>33</sup> and smaller than AT&T (\$51 billion revenue, \$4.3 billion net income).<sup>34</sup> Just because a single competitor, AT&T, is larger than either Bell Atlantic or GTE does not mean that the latter companies should be permitted to merge; such "leapfrog" reasoning for mergers would ultimately result in two companies in a market.

In short, there is no reason to believe that Bell Atlantic and GTE could not compete in other markets without combining into a super ILEC. GTE already has all the financial clout it needs to go forth from its incumbent territory compete against other neighboring ILECs in the country's major metropolitan areas (including Bell Atlantic's Washington, D.C. service territory near Dulles), together with the broad range of products it needs to offer its customers a total package of services. There is simply no reason (other than obtaining a monopolistic advantage) why it needs to merge with Bell Atlantic before competing outside its current service areas. Neither should Bell Atlantic, which is itself the product of a merger of two ILECs serving a major metropolitan corridor with a lucrative customer base, need GTE's help to launch competitive forays into other ILEC areas. Instead, for the reasons set forth above, the merger is all the more likely to result in Bell Atlantic and GTE becoming entrenched in their home markets and avoiding costly stand-offs with other super ILECs.

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<sup>32</sup> Sprint 1997 Annual Report.

<sup>33</sup> WorldCom, SEC Form 10-K (1997); MCI, SEC Form 10-K (1997).

<sup>34</sup> AT&T Earnings Commentary: October 26, 1998 3Q 1998 Appendices, <http://www.att.com/ir/commentary/983q-cmnt-a.html#appendix-ii>.

**C. In Reviewing this Proposed Merger, the Commission Should Consider Whether the Union of Bell Atlantic and GTE Would Enhance GTE's Already Troubling Anticompetitive Conduct.**

In reviewing this merger and the SBC-Ameritech merger, the Commission should take careful note of how these ILECs have failed to implement meaningfully the procompetitive provisions of the 1996 Act. While US Xchange has not provided service yet in Bell Atlantic's region, its firsthand experiences with GTE are relevant and present a significant cause for concern in any proceeding to consider the enhancement of GTE's already substantial market power. Specifically, through its negotiations and arbitrations with GTE, and its participation in various other local competition proceedings with the ILEC, US Xchange has learned that the costs of doing business in GTE territory often include the costs of fighting to obtain basic concessions to which CLECs are entitled under the Act. The Commission should consider whether the additional market power that would inure to GTE as a result of this proposed merger would give the new mega-ILEC even greater incentive and ability to complicate competitive entry into its service territories.

US Xchange has obtained an interconnection agreement with GTE in Wisconsin, and is in the process of negotiating agreements for Illinois and Michigan as well. (As discussed below, the parties required negotiations and arbitration to reach an agreement in Indiana.) Although the Act establishes a carefully defined schedule for negotiating such agreements, GTE has employed tactics that serve to make these negotiations more difficult, protracted, and costly. GTE's negotiating position regularly ignores and conflicts with state arbitration rulings that have already been issued. Moreover, even though US Xchange and GTE had negotiated previously in Wisconsin and Indiana, in the more recent negotiations, GTE initially indicated that US Xchange would need to start all over again from GTE's standard form agreement in the other states – thereby prolonging the negotiation

process just to have the parties arrive back at the same results. Eventually, GTE relented on this point, but not before US Xchange was forced to expend time and resources in an effort to gain the benefits of the progress made in prior negotiations between the companies. Such tactics serve only to delay competitive entry and ensure that it is as costly as possible for CLECs to enter GTE territory.

Moreover, GTE's refusal to execute an agreement in which all legal issues should have been fully resolved represents no more than an effort to deny competitors the opportunity to avail themselves of section 252(i) rights and to drive up artificially the costs of competitive entry. In Indiana, for example, US Xchange had sought to avail itself of the rates set by the Commission in an AT&T-GTE arbitration. Rather than allowing US Xchange to have those rates, however, GTE claimed that US Xchange would need to accept the rates originally proposed by GTE (and rejected by the Commission) in that AT&T arbitration because the AT&T agreement had not yet been executed. Thus, US Xchange was forced to arbitrate the question of rates all over again, notwithstanding the fact that GTE had lost on this very same issue only a year before. The Commission ruled in US Xchange's favor, finding that its decision on rates in US Xchange's case should no different than its conclusions in prior arbitrations.<sup>35</sup> Thus, while the matter in Indiana was resolved in US Xchange's favor, GTE's patent disregard for state commission precedent makes it impossible for competitors such as US Xchange to arrive at a reasonable interconnection agreement in a timely and relatively inexpensive manner.

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<sup>35</sup> *US Xchange of Indiana, L.L.C. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with GTE North Incorporated*, Cause No. 41034-INT-01 (Ind. U.R.C. Feb. 11, 1998), at 3-5.

Finally, even after it completes an arbitration and ultimately executes an agreement, GTE's implementation process can present yet another roadblock to swift competitive entry. Following the arbitration between US Xchange and GTE in Indiana, the parties' interconnection agreement became effective on April 12, 1998. Yet more than one month later, US Xchange was forced to confront GTE because the latter continued to drag its feet on implementing the agreement. Although the agreement obligated US Xchange and GTE to establish points of interconnection within 120 days of the effective date, GTE had failed to respond to any US Xchange overtures to commence with such interconnection. Similarly, GTE personnel refused to provide KMC with a 911/E911 contact person for 20 days, and even after identifying such a contact, refused to coordinate arrangements for the interconnection of US Xchange's and GTE's 911/E911 systems. Although GTE eventually agreed to work with US Xchange to establish interconnection arrangements pursuant to the agreement, it should not have taken additional contact threatening legal action to prompt GTE to work with US Xchange, and GTE's stalling tactics hindered US Xchange's efforts to begin providing competitive service options in Indiana.

## **II. THE MERGER WILL PROVIDE NO APPRECIABLE COMPETITIVE BENEFIT IN THE LONG DISTANCE MARKET.**

In addition to their various claims regarding the benefits of the merger in terms of local competition, Bell Atlantic and GTE argue that the merger will allow the combined company to build nation-wide long distance network, and thus bolster interexchange competition as well. They claim that there are really only three "fully national facilities-based carriers" (MCI WorldCom, AT&T and Sprint), and that a fourth national network will add significantly to competition.<sup>36</sup> This argument

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<sup>36</sup> *Application*, Public Interest Statement at 4, 18-20.

is a rehash of GTE's tired – and rejected – argument raised in opposition to the MCIWorldCom merger. Specifically, GTE claimed that a merger between MCI and WorldCom would harm competition in the interexchange market as it would reduce the number of national networks from four to three. In rejecting the argument, the Commission noted that "the supply of transmission capacity is expanding significantly with the construction of four new national fiber-optic networks by Qwest, IXC, Williams, and Level 3."<sup>37</sup> Because the interexchange service market *is* a competitive market, the Commission acknowledged that there would be a significant number of national facilities-based carriers to "constrain any attempted exercise of market power," and that "new carriers likely will be able to constrain any coordinated exercise of market power by the incumbents."<sup>38</sup> The Commission concluded that "the coverage of the new networks is sufficient to provide competitive national long distance service."<sup>39</sup>

Thus, there will shortly be four *additional* national networks to complement the three networks identified by Bell Atlantic and GTE. With seven national networks, the incremental benefit associated with an eighth national network – in a market the Commission has already found to be competitive – can hardly be touted as significant. Moreover, Bell Atlantic and GTE fail to explain why either company does not already possess the financial ability to build an eighth network (assuming the market demand for such a network exists). Qwest, IXC, Williams or Level 3 have somehow managed to schedule the deployment of a national network without the need for anchor

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<sup>37</sup> *MCI/WorldCom Merger Order*, at ¶ 43.

<sup>38</sup> *Id.* at ¶¶ 51, 64.

<sup>39</sup> *Id.* at ¶ 54.

clients or the pre-existence of a substantial customer base. Quite simply, if GTE or Bell Atlantic do not have the will to enter the interexchange market now, there is no evidence that would indicate that the combined company will develop such an inclination following the merger.

### **III. THE PROPOSED MERGER SHOULD BE REJECTED AS CONTRARY TO THE PUBLIC INTEREST.**

For the foregoing reasons, the Commission should find that approval of this proposed merger would not be in the public interest. Even conditions such as those imposed in the *BA/NYNEX Merger Order* would prove insufficient in corralling the super-ILEC's propensity and ability to engage in anticompetitive conduct in the present case. Indeed, the *BA/NYNEX Merger* conditions have proven inadequate in ensuring that even the present version of Bell Atlantic complies with the procompetitive provisions of the Act. As MCI explained earlier this year in a Complaint filed with this Commission, "Bell Atlantic previously failed to comply with the Merger Order, and continues to do so, through its failure to price unbundled network elements based on forward-looking economic costs. . . . Bell Atlantic has now compounded its complete disregard for the critical market-opening provisions in the Commission's Merger Order by refusing to negotiate in good faith to develop adequate performance standards, remedies, and associated reporting."<sup>40</sup> In light of the inefficacy of the *Bell Atlantic/NYNEX Merger Order* conditions and the likelihood that GTE and Bell Atlantic could use their combined market power to place even greater limits on competitive entry, US Xchange recommends that the Commission reject the Application filed by Bell Atlantic

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<sup>40</sup> Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

and GTE because of the threat a merger would pose to the local exchange market and the minimal promise of this transaction for competition in the long distance market.

If the Commission finds, however, that this merger should be approved, improved conditions are needed to ensure that the new super-ILEC will truly open its markets to competitive entry, and swift sanctions are essential to address any failure to comply with these market-opening conditions. Specifically, US Xchange would recommend that the Commission utilize the *Bell Atlantic/NYNEX Merger Order* conditions as a floor, and apply the following conditions to any grant of approval as well.

**A. Pre-Merger Conditions**

If the Commission should determine that the merger of Bell Atlantic and GTE is to be sanctioned, it should find the merger is in the public interest only if the two companies agree to divest themselves of any aspects of their operations that relate to the provision of interLATA services to customers in those service areas in which either company is the ILEC. GTE has sold long distance service in all 50 states since the end of 1996,<sup>41</sup> and Bell Atlantic offers interLATA in all but 4 states outside of its region.<sup>42</sup> If the merger is approved without a divestiture pre-condition, GTE may very well believe it is entitled to carry interLATA traffic within the Bell Atlantic region without violating section 271. Bell Atlantic will undoubtedly take the same view of its provision of long distance services to any customer in GTE's current service areas. Yet, from a competitive perspective, there is no difference whether it is Bell Atlantic or GTE providing this in-region,

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<sup>41</sup> See GTE Corporation Annual Report 1996, "Introduction," <http://www.gte.com/AboutGTE/annual1996/intro/intro.html>.

<sup>42</sup> See <http://www.callbell.com>.

interLATA service following the merger. Either the ILEC itself or its affiliate will be providing long distance service, with all of the discrimination and access charge subsidy concerns that first gave rise to the MFJ present regardless of which entity provides the service.

While GTE is not barred from offering interLATA services in its incumbent service areas at this time, such a prohibition is necessary in those areas as well to ensure that the new super-ILEC cannot engage in anticompetitive behavior. If this merger is consummated, the former GTE side of the Bell Atlantic-GTE behemoth will have just as much incentive and an even greater ability to discriminate against competitors as the former Bell Atlantic side of the company does standing alone. Thus, approval of this merger should be conditioned upon a complete abandonment of interLATA services by the new Bell Atlantic-GTE throughout the current Bell Atlantic and GTE service territories, unless and until the super-ILEC demonstrates that the competitive nature of its operations in a particular state warrant section 271 relief.

Divestiture would also promote competition indirectly. By divesting these long distance operations, the new Bell Atlantic-GTE would not only come into compliance with the section 271 proscriptions on interLATA services in its own region, but it would also raise additional capital that could prove useful as it begins its promised competitive forays into the local service territories of other ILECs.

#### **B. Post-Merger Conditions**

US Xchange further submits that, if the merger is to be approved, additional measures are needed *following the merger* to ensure that competition takes root in the new super-ILEC's service territories. Specifically, the Commission should address the following concerns in structuring conditions for merger approval:

**1. Stranded Cost Recovery:** Since enactment of the Telecommunications Act of 1996, GTE has consistently taken the position that it should be entitled to recover all of its historical costs from competitors through UNE prices, notwithstanding the forward-looking cost standard contained in section 252(d) of the Act. From Missouri to Hawaii to Indiana to Minnesota to North Carolina,<sup>43</sup> GTE has repeatedly argued that the 1996 Act has caused it harm, such that it is forced to sell access to its network elements at rates that are somehow less than compensatory. Of course, such claims are flatly inconsistent with the optimistic tone taken by GTE in its 1996 Annual Report, when its Chairman trumpeted passage of the 1996 Act as “a triple-win situation. It’s good for the country. It’s good for consumers. And it’s *great* for GTE.”<sup>44</sup>

The Act expressly prohibits the kind of stranded cost recovery that GTE has proposed in state after state. Section 252(d) of the Act specifically limits the costs that ILECs will be allowed to recover to those costs “determined without reference to a rate-of-return or other rate-based proceeding.”<sup>45</sup> While the statute clearly disallows the stranded cost recovery that GTE repeatedly proposes, and no state commission to date has approved such a recovery mechanism in the telecommunications context, GTE continues to offer up this proposal in state after state in an effort to inflate its prices and foist historical costs onto competitors. Indeed, Missouri, Indiana, and

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<sup>43</sup> Case No. TO-97-124 (Mo. P.S.C.); Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-442, 407/M-96-939 (Minn. P.U.C.); Docket No. P-100, Sub133d (North Carolina U.C.).

<sup>44</sup> GTE Corporation Annual Report 1996, Chairman’s Message (emphasis in original) <http://www.gte.com/AboutGTE/annual1996/letter.html>.

<sup>45</sup> 47 U.S.C. § 252(d)(1)(A)(i) (1996).

Minnesota have already issued rulings denying GTE's efforts to raise the costs that new entrants will pay to access its network and compete for customers.<sup>46</sup>

It is immaterial that GTE tends to propose such recovery through a stand-alone surcharge. Quite simply, neither Bell Atlantic nor GTE should be permitted to smuggle in the back door what the Act prohibits through the front door, and it should not be permitted to relitigate this losing issue in state after state so that its competitors are forced to spend time and resources overcoming this proposed barrier to entry. Consistent with its own interpretation of the Act and the reasonable opinions of all states that have thus far considered GTE's efforts to recover stranded costs, this Commission should ensure that GTE cannot yet again attempt to impose the exaggerated, embedded costs of its network operations on its competitors. In short, the Commission should require as a condition of merger approval that Bell Atlantic-GTE charge forward-looking prices – and only forward-looking prices – to new entrants seeking to compete with the mega-ILEC.

**2.     *Resale Restrictions and Pricing:*** The Commission should require the new Bell Atlantic-GTE to commit to eliminate unreasonable restrictions on resale and to provide greater wholesale discounts on resold services in accordance with the avoidable cost standard set forth in

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<sup>46</sup>     *Re Sprint Communications Company, L.P.*, Case No. TO-97-124, 176 P.U.R. 4th 285, 289 (Mo. P.S.C. Jan. 20, 1997); *In the Matter of the Commission Investigation and Generic Proceeding on GTE's Rates for Interconnection Services, Unbundled Elements, Transport and Termination Under the Telecommunications Act of 1996*, Cause No. 40618 (I.U.R.C. May 7, 1998); *AT&T Communications of the Midwest, Inc.*, Docket No. P-442, 407/M-96-939, 1997 WL 178602, at \*12 (Minn. P.U.C. Mar. 14, 1997). The Hawaii Public Utilities Commission has also issued a proposed decision that denies GTE stranded cost recovery. *Public Utilities Commission Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Docket No. 7702, Proposed Decision and Order (Haw. P.U.C. Nov. 13, 1998), at 107. A decision on GTE's proposed stranded cost recovery mechanisms is pending in North Carolina.

the *Local Competition Order*. For example, it is our understanding that Bell Atlantic has taken the position that whenever a customer under a contract service arrangement ("CSA") wants to switch the contracted service to a reseller, that switch of service is a termination of the CSA for which penalties will be assessed against the end user.<sup>47</sup> This unreasonable restriction has no basis in law and serves only to deter end users from availing themselves of the competitive opportunities envisioned by the Act.

**3. Availability of Arbitrated Rates:** In a number of states, GTE is declining to make available to other carriers those UNE prices and resold discounts that are the product of its arbitrations with AT&T.<sup>48</sup> Because AT&T and GTE have not executed final interconnection agreements in many states, GTE prevents other CLECs from purchasing UNEs and resold services from GTE at the arbitrated rates. In essence, GTE would require each CLEC to relitigate the same cost studies to obtain these rates. Quite simply, this is a barrier to entry that GTE has erected out of legal fiction. Requiring Bell Atlantic and GTE to make their arbitrated rates available to all competitors will dramatically reduce the legal costs associated with competitive entry and spare state commissions the administrative burden of repetitive arbitration proceedings.

**4. Special Construction Charges:** The Commission should require the new Bell Atlantic-GTE to refrain from charging special construction charges to CLECs – or to the CLECs’

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<sup>47</sup> See *Complaint and Request of CTC Communications, Inc. for emergency relief against New York Telephone d/b/a/ Bell Atlantic-New York for violation of sections 251(c)(4) and 252 of the Communications Act of 1934, as amended, section 91 of the N.Y. Pub. Serv. Law, and Resale Tariff PSC No. 915, Case 98-C-0426, Order Granting Petition* (N.Y.P.S.C. Sept. 14, 1998).

<sup>48</sup> *US Xchange of Indiana, L.L.C. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with GTE North Incorporated*, Cause No. 41034-INT-01 (Ind. U.R.C. Feb. 11, 1998), at 3-5.

end users – when such charges would not be charged to the super ILEC's own end user customers. Moreover, to the extent that such charges are imposed upon CLECs or their end users, the super ILEC should be required to provide justification for imposing these charges and forward-looking TELRIC analyses supporting their imposition if challenged.

5. ***IntraLATA Toll Dialing Parity:*** The Commission should require the new Bell Atlantic-GTE to provide 1+ intraLATA dialing parity in all states throughout its combined region by no later than February 8, 1999, if not otherwise required to implement dialing parity sooner. Bell Atlantic has litigated and lost in numerous states on the position that it is not required to implement toll dialing parity by this date under the Act. While proceedings to consider this matter are pending in several other states, clear direction from this Commission would remove any uncertainty in all jurisdictions going forward and save CLECs further costs in prosecuting such claims.

6. ***Interim Number Portability:*** Despite the fact that this Commission has ruled that interim number portability ("INP") costs should be recovered from competitors in a competitively neutral manner,<sup>49</sup> GTE has proposed in Indiana and in other states that it should be permitted to recover the full incremental cost of providing INP from its competitors.<sup>50</sup> The Commission specifically rejected such a proposal in its *Number Portability Order*, and instead set forth a number of alternative mechanisms for states to consider in deciding how INP costs should be recovered. Rather than making competitors fight this issue all over again with GTE in yet another jurisdiction,

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<sup>49</sup> *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order (rel. July 2, 1996), at ¶ 138 ("*Number Portability Order*").

<sup>50</sup> Cause No. 40618 (Indiana U.R.C.); Docket 7702 (Hawaii P.U.C.); Docket No. P-100, Sub133d (North Carolina U.C.).

this Commission should compel the new Bell Atlantic-GTE, as a condition of merger approval, to establish a competitively neutral INP cost recovery mechanism that is consistent with those set forth in the *Number Portability Order*.

7. ***Winback Programs:*** The Commission should issue a clear directive regarding the use of winback programs by Bell Atlantic-GTE, and the sharing of information between its retail and wholesale operations. To stop any anticompetitive, backdoor sharing of information, the Commission should establish that the ILEC's winning back of a customer prior to switching over to the competitor's retail service is *prima facie* evidence of a violation of section 251 of the Act. Moreover, to ensure that Bell Atlantic-GTE's incentives to engage in such conduct are minimized, the Commission should consider establishing a window of time – perhaps 15 or 30 days – during which the super ILEC would be prohibited from contacting any customer that has switched to a competitor's service.

8. ***Collocation Arrangements:*** The Commission should direct the new Bell Atlantic-GTE to provide more flexible collocation arrangements if the merger is approved. For example, the Commission should require the super ILEC to: (i) offer carriers access to less than 100 square feet of collocation space; (ii) allow carriers to use "cageless collocation;" and (iii) allow carriers to collocate equipment that is necessary for interconnection and the use of unbundled network elements, even if that equipment could also be used for other purposes.

9. ***Non-Recurring Charges:*** Bell Atlantic-GTE should be required to impose only reasonable, cost-based non-recurring charges ("NRCs") for services provided to competitors. In the resale context, where there is a retail analog to the charge that would be imposed upon the reseller, these NRCs should be developed on the basis of an avoided cost analysis that applies a wholesale

discount to the retail NRC. In the context of UNEs and where a retail analog does not exist for a resale NRC (*e.g.*, a service migration charge), the NRCs should be developed using TELRIC principles.

**10. *Resale of Voicemail:*** If the merger is to be approved, Bell Atlantic-GTE should be required to make its voicemail services ("VMS") available for resale at an avoided cost discount, or at the very least, at the retail price for those services. Technical limitations and economic barriers prevent resellers from offering VMS in the same manner and at the same level of quality that the ILEC offers to its own customers. The inability to provide VMS places resellers at a competitive disadvantage, as they cannot offer an entire segment of the ILEC's customer base the VMS they have come to expect from the incumbent. Requiring Bell Atlantic-GTE to provide VMS for resale would eliminate the tying arrangement between the ILEC's local exchange service and its VMS, and provide resellers with the opportunity to compete for each and every customer in the ILEC's embedded customer base.

**11. *Performance Reports:*** The Commission should also require the combined Bell Atlantic-GTE to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the BA-NYNEX merger.<sup>51</sup> Since Bell Atlantic is already compiling data on a monthly basis under the existing merger conditions, it should not be too much of an additional burden to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent – especially one like the proposed Bell Atlantic-

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<sup>51</sup> See *BA/NYNEX Merger Order*, at Appendix C.1.d.

GTE company, which would have a monopolistic level of market share and bottleneck control of essential facilities across such a large span of the nation.

**12. Performance Standards:** Finally, the Commission should attach conditions to the merger compelling Bell Atlantic-GTE to satisfy certain levels of performance in providing interconnection services, UNEs, and resold services to competitors. For each reporting category imposed as part of Condition 13, the new super ILEC should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when Bell Atlantic-GTE is discriminating in the provision of service.

US Xchange recognizes that the Commission tentatively concluded in its OSS rulemaking that it would be "premature" to develop performance standards.<sup>52</sup> There is no other means available, however, to ensure that Bell Atlantic-GTE will provide service in a nondiscriminatory manner. If the Commission believes there is not enough evidence on the record to establish sufficiently detailed performance standards, it could adopt interim performance standards that are based upon how Bell Atlantic-GTE provide service in the context of their retail operations. Specifically, the Commission could first direct Bell Atlantic-GTE to identify a level of performance that mirrors its own self-provisioning of service, and after several months of reports, the Commission could revisit this issue and adjust the standards as necessary. Alternatively, the Commission could utilize a "floating" standard of performance for each category, such that the standard for each month would be set by looking at Bell Atlantic-GTE's performance in running its retail operations during that month. In

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<sup>52</sup> *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

either case, these standards could be superseded once permanent performance benchmarks are established in the Commission's OSS proceeding.

### **C. Sanctions**

More detailed conditions and more stringent reporting requirements are only a means to an end in minimizing the new super ILEC's ability to discriminate against competitors. The larger question is whether CLECs will be able to do anything if they discover that the new Bell Atlantic-GTE is in fact engaging in discriminatory conduct or violating the merger conditions. Unfortunately, as the MCI Complaint demonstrates, reliance upon the Commission's complaint procedures may not bring speedy resolution. Thus, the Commission should establish a system of reasonable yet strict financial sanctions for failure to adhere to the performance standards incorporated in the merger conditions. For example, if the combined Bell Atlantic-GTE's performance in any category in which it is required to report falls below the level of performance it provides for its own operations for three consecutive months, the Commission should assess a fine of \$75,000 for each month thereafter that the substandard performance in that category continues. The proposed amount of this fine has a sound basis, as Bell Atlantic has previously entered into interconnection agreements that provide for such liquidated damages in cases of performance breaches.<sup>53</sup>

Moreover, the Commission should create an entirely separate system of penalties to be imposed if Bell Atlantic-GTE violates any of the other, non-performance related merger conditions. For example, in instances in which the super ILEC fails to provide reports on a monthly basis or

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<sup>53</sup> See *Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 Dated as of June 25, 1996 by and between New York Telephone Company and MFS Intelenet of New York, Inc.*, at §27.3 (providing for liquidated damages of \$75,000 for each specified performance breach by New York Telephone).

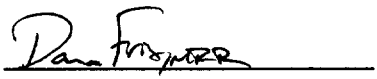
refuses to resell VMS to competitors, the Commission should impose a penalty of \$500 per day for a continuing violation. As in the case of performance breaches, this amount also has a sound basis; 47 U.S.C. § 502 allows the Commission to impose such a fine for each and every day that a person willingly and knowingly violates any Commission rule, regulation, restriction, or condition. Such sanctions will avoid the need for lengthy, time-consuming, and expensive litigation in each case when Bell Atlantic-GTE fails to satisfy a condition of the merger.

#### IV. CONCLUSION

Given the severe competitive concerns raised by this proposed merger, US Xchange submits that the Commission should reject the union of Bell Atlantic and GTE because of the harm it would cause to the public interest. In the alternative, if the Commission finds that this transaction should be approved, US Xchange respectfully requests that approval should be conditional upon Bell Atlantic-GTE agreeing to adhere to reasonable conditions aimed at limiting the mega-ILEC's ability to thwart competitive entry into its local exchange markets. Moreover, the Commission should establish a system of sanctions for failures to meet specified performance metrics and for breaches of other merger conditions, so that the new Bell Atlantic-GTE would be deterred from breaching the merger conditions and improperly exercising its increased market power over potential rivals.

Respectfully submitted,

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Dated: November 23, 1998

## CERTIFICATE OF SERVICE

I, Joyce A. Gustavson, hereby certify that on this 23<sup>rd</sup> day of November 1998, copies of the foregoing **COMMENTS OF US XCHANGE, L.L.C. IN OPPOSITION TO THE MERGER OF BELL ATLANTIC CORPORATION AND GTE CORPORATION** were served on the following parties via first-class U.S. mail, postage pre-paid:

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